

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

21X Capital Ltd., et al.,

NO. C 06-04135 JW

Plaintiffs,

v.

**ORDER APPOINTING PROFESSOR
ELIZABETH MILLER AS A RULE 706
EXPERT**

Robert Werra, et al.,

Defendants.

On September 30, 2008, the Court issued a Preliminary Order Appointing Rule 706 Expert. (hereafter, "Preliminary Order," Docket Item No. 145.) In the Preliminary Order, the Court named Professor Elizabeth Miller as its designated Rule 706 Expert, and described the scope of the putative appointment as well as the method of allocating the Expert's fees between the parties. The Court gave the parties ten days to object to the proposed appointment. To date, no objection has been filed with the Court. Having received no objection, the Court appoints Professor Elizabeth Miller as its Rule 706 Expert.

A. Scope of Appointment

The Rule 706 Expert shall consider and address the following issues:

- (1) What formalities are required by Texas with respect to capitalization, loans, or other financial or business conduct for a Texas limited liability company? Specifically, are there any requirements for the following:
 - (a) LLC capitalization at formation and post-formation, including any amount of minimum initial capitalization;

- (i) the need for written promissory notes to evidence and memorialize the initial capitalization of the LLC if there is a promise from the members to pay the initial capitalization of \$1,000;
 - (ii) whether a LLC can be considered “undercapitalized” in light of business then being undertaken, even if the members initially capitalize the LLC with \$1,000 in the form of an unsecured loan;
 - (b) LLC funding during operation;
 - (c) LLC income during operation;
 - (d) loans provided to or from a LLC;
 - (e) payments made by a LLC;
 - (f) payments made on behalf of a LLC;
 - (g) preparation of LLC tax returns;
 - (h) a LLC’s day-to-day business operations;
 - (i) disclosures made to third parties;
 - (j) interested party transactions, such as transactions between a LLC and its managers or members;
 - (i) whether any documentation is required with respect to loans by members to LLCs;
 - (ii) whether any protocols are required for such interested party transactions;
 - (k) member meetings and the memorialization of meetings;
 - (l) whether Generally Accepted Accounting Principles, or some other accounting standards, are typically followed by LLCs;
- (2) Under Texas law, who is responsible for ensuring that a limited liability company observes its formalities?
 - (a) Who, if anyone, is most responsible for assuring that a LLC observes requisite formalities; how are such responsibilities allocated between managers,

members, officers, or other LLC employees or agents?

(b) Is there any formal scrutiny to determine if formalities are being observed?

(c) Does the designated tax member have any particularized duties or responsibilities?

The Court reserves the right to modify the terms and conditions of appointment.


B. Fees and Costs

Each party shall bear the cost of the Rule 706 Expert on an equally divided basis, payable in advance. Expert shall provide to the parties and the Court, an estimate of her fees and costs based on the scope of appointment. The Expert will then set up a trust account whereby the parties shall deposit their respective shares of the fees and costs. The Expert shall issue statements and draw from the trust account on a periodic basis as required in performance of the appointment. See Fed. R. Evid. 706(b). All disputes regarding fees and costs are referred to the assigned Magistrate Judge.

C. Schedule

Professor Miller shall meet and confer with the parties and then submit a Preliminary Report containing the following information: (1) schedule for production of the Expert's Report consistent with the scope of appointment; (2) method of calculation of the Expert's fees; and (3) the status of a trust account for payment of the Expert. The Preliminary Report shall be filed with the Court on or before **December 1, 2008**.

Dated: October 17, 2008



JAMES WARE
United States District Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Elizabeth Miller Elizabeth_Miller@baylor.edu

Dated: October 17, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy